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No. .....

IN THE

Supreme Court of the United States

October Term, 1972

FANNIE SMITH, ADMINISTRATRIX
OF THE ESTATE OF
JOSEPH SMITH, DECEASED, Petitioner,

vs.

OLSEN & UGELSTAD, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Fannie Smith, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on May 8, 1972 affirming a judgment of the United States District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

Opinion of the United States District Court for the Eastern District of Michigan, Southern Division, filed February 24, 1971, appears in Appendix A hereto, *infra*,

page 1a. The Judgment and Order of the District Court was entered on March 30, 1971 and appears in Appendix B hereto, *infra,* page 8a.

The judgment and opinion of the United States Court of Appeals, Sixth Circuit, was entered on May 8, 1972 affirming the judgment of the United States District Court, a copy of which judgment and opinion is appended hereto as Appendix C, *infra,* page 9a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered May 8, 1972 (Appendix C, *infra,* page 9a). A request was timely made by petitioner for extension of time in which to petition for a Writ of Certiorari and was granted September 8, 1972 extending the time to October 5, 1972 (Appendix D, *infra,* page 16a.)

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.1 (Appendix E *infra,* page 16a.)

QUESTIONS PRESENTED

1. **Under the Supreme Court ruling in *Usner v Luckenback Overseas Corp. et al,* 400 U.S. 494 does a single act of negligence by a longshoreman who uses an improper, unsafe method of unloading cargo that is in violation of Safety and Health Regulations for Longshoring, render a vessel unseaworthy so as to permit recovery for resulting death of a fellow longshoreman?**
2. **Does a violation of Safety and Health Regulations for Longshoring render a vessel unseaworthy? *29 CFR Sec. 1504.83***
3. **Is the decision in the instant case by the Sixth Circuit Court of Appeals in conflict with the decisions of the courts in other circuits?**

STATEMENT OF THE CASE

During an unloading operation on the ship M/V Makefjell on October 14, 1968, longshoreman Joseph Smith was crushed to death by a falling wooden crate containing glass. His legal wife and administratrix of his estate, Fannie Smith, petitioner herein, brought this action asserting the maritime claim for unseaworthiness against the shipowner, Olsen & Ugelstad, respondent herein.

The action was instituted pursuant to Rule 9(h) Federal Rules of Civil Procedure as it pertains to admiralty and maritime claims. Title 28 U.S.C. Section 1292 (a)(3).

The cargo in hold #4, where the accident occurred, consisted of wooden crates of glass each weighing approximately one ton. The crates were stacked four tiers high. They were unevenly stowed. Same size crates were not stowed on top of each other. Each crate had three four-inch skids attached to its base. The middle skid of the fatal crate was rounded 12-13 inches making it unstable and causing it to rock.

Prior to the accident most of the crates had been removed from the hold. Remaining was a single line of crates four tiers high in separate stacks against the forward bulkhead. On the fourth level of one stack were two smaller crates. These companion crates, sitting side by side, covered a wider space laterally than those beneath them in the column. As a result, the outside skid of each of the companion crates extended beyond the sides of the stacks below. To the right of this column were other stacks.

When the hilo operator removed the two crates under the fatal crate, it left the fatal crate unsupported and overhanging the crate below by several inches. The crate

remained in this precarious condition for about thirty seconds when it fell and killed the deceased.

Normal, safe procedure is to remove the higher crates first. This was not done.

The Safety and Health Regulations for Longshoring required (a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling. (b) In breaking down, precautions shall be taken when necessary to prevent the remaining cargo from falling. *29 CFR Art. 1504.83.* This was not done.

The Trial Court found that the cause of the accident was the negligence of the longshoreman hilo operator in taking down the crates in improper order; and, that "The Longshoring Regulations have the force and effect of law and were plainly breached."

The Trial Court further held: "It is now clear that instant unseaworthiness resulting from the operational negligence of the stevedoring contractor or his servants is not a basis for recovery by an injured longshoreman" citing *Usner* v. *Luckenback Overseas Corp., et al* 400 U.S. 494, 27 L.Ed. 2d 562, 91 S.Ct. 514.

The Administratrix appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment of the lower court holding that the longshoreman's death resulted from an isolated, single, unforseeable personal act of negligence which did not create a condition of unseaworthiness relying on *Usner, supra.*

Petitioner appeals from this decision.

ARGUMENT

Petitioner contends that Certiorari should be granted because an important question as to the interpretation of a Supreme Court decision regarding admiralty law is involved.

Petitioner contends that the decision of the United States Court of Appeals, Sixth Circuit, in the instant case, is contrary to the United States Supreme Court's ruling in the case of *Usner* v. *Luckenback Overseas Corp.*, supra, upon which it relied, and that it is necessary for this Court to now clarify its interpretation of unseaworthiness.

QUESTION 1.

UNDER THE SUPREME COURT'S RULING IN *USNER v. LUCKENBACK OVERSEAS CORP., ET AL*, 400 U.S. 494 A SINGLE ACT OF NEGLIGENCE BY A LONGSHOREMAN WHO USES AN IMPROPER, UNSAFE METHOD OF UNLOADING CARGO THAT IS IN VIOLATION OF SAFETY AND HEALTH REGULATIONS FOR LONGSHORING, RENDERS A VESSEL UNSEAWORTHY SO AS TO PERMIT RECOVERY FOR RESULTING DEATH OF A FELLOW LONGSHOREMAN.

Petitioner states that the instant case combined (1) an isolated single act of negligence on the part of a longshoreman, in using an improper method of unloading cargo, and (2) a breach of Safety and Health Regulations for Longshoring, and that these two factors, separately or combined, constituted unseaworthiness differentiating the facts in this case from the *Usner* case.

This is not merely an isolated act of negligence on the part of a fellow longshoreman. The facts clearly indicated to the Trial Court that an improper method of unloading existed as well.

The District Court found in its Findings of Fact and Opinion:

> "It was only after some of the lower crates were removed that the fatal crate became insecure." And,
> "The stow of the fatal crate was such that its

entire skid on the side nearest the center of the ship was unsupported when the two crates were removed."

The Trial Court further stated:

> "Our necessary conclusion is that if the crates had been removed from the stow in proper order, top crate first, as the commonest prudence required, this tragic accident would never, could never, have occurred."

The Sixth Circuit Court of Appeals held that:

> "Appellant correctly observes that an unsafe procedure prescribed for unloading cargo may result in a condition of unseaworthiness. *See A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962)" And,
>
> "Unseaworthiness may occur when the unsafe condition is only temporary or transitory." *Mitchell* v. *Trawler Racer*, 362 U.S. 539.

The Sixth Circuit Court of Appeals goes on to discuss whether Smith's death resulted from an act of negligence or a condition of unseaworthiness and states:

> "Very likely a resolution of this problem will often involve metaphysics as well as judgment. A negligent act conceivably could produce a hazardous condition or it might be completed without causing this result. The determination of the distinction will oftentimes be elusive and will depend upon the particular facts of the given case."

Assuming the above findings of fact and law by the District Court and Sixth Circuit Court of Appeals are accurate, petitioner contends the Sixth Circuit Court of Appeals came to an erroneous conclusion in its application of the *Usner* case.

The negligence of the longshoreman and the improper method of unloading were one and the same in the instant case.

There was therefore, an unsafe procedure used by the longshoreman in unloading the cargo leaving the crates in a dangerous and precarious position and this dangerous method of unloading when accompanied by the further negligent act of the longshoreman resulted in the death of Smith. This takes it out of the realm of the *Usner* case and makes respondent liable for Smith's death because it rendered the vessel unseaworthy.

It becomes necessary to interpret the *Usner* case in the light of the facts in the instant case for surely there is but a thin line between an isolated act of negligence in improperly unloading cargo and an improper method of unloading cargo resulting in a condition of unseaworthiness. When does a single act of negligence in improperly unloading cargo become a condition of unseaworthiness?

Whether the death of Smith resulted from a single act of negligence in improperly unloading cargo or from the improper method of unloading cargo resulting in a condition of unseaworthiness is clearly a matter of semantics.

The vessel was unseaworthy because of the unsafe procedure prescribed for unloading cargo. See *A & G Stevedores* v. *Ellerman Lines*, supra. Unseaworthiness may occur when the unsafe condition is only temporary or transitory (*Mitchell* v. *Trawler Racer*, supra.)

It is clearly a matter of rhetoric to say that a single act of negligence in improperly unloading cargo resulted in Smith's death rather than that said act of negligence in following an unsafe procedure of unloading created an unseaworthy condition causing Smith's death.

The Sixth Circuit Court held in the instant case that to distinguish between an isolated act of negligence in unloading cargo and an improper method of unloading cargo

is often within the realm of metaphysics. It is a distinction without a difference and it is, therefore, necessary for the United States Supreme Court to clarify the *Usner* decision to make its application more practicable and uniform. Surely justice should have better guidelines and this Court should provide them.

QUESTION 2

A VIOLATION OF SAFETY AND HEALTH REGULATIONS FOR LONGSHORING *(29 CFR Sec. 1504.83)* RENDERS A VESSEL UNSEAWORTHY.

Petitioner contends that the violation of Safety and Health Regulations for Longshoring in the instant case rendered the vessel unseaworthy.

The District Court found:

> "Safety and Health Regulation for Longshoring required
>
> (a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling.
>
> (b) In breaking down, precautions shall be taken, when necessary to prevent the remaining cargo from falling. *29 CFR Sec. 1504.83*
>
> "The record is barren of any testimony as to efforts of the longshoremen to prevent the crate from falling."

The Trial Court further found that "Longshoring Regulations have the force and effect of law and were *plainly breached*". (Italics ours.) citing *Manning v. M/V Sea Road* 417 F. 2d 603. Despite this finding, the Trial Court found the ship was seaworthy.

The Sixth Circuit Court of Appeals should not have ignored the District Court's findings that "The Longshoring Regulations have the force and effect of law and were

plainly breached". Petitioner's brief to the Sixth Circuit Court argued that the stevedoring company and/or its employees failed to secure or block the cargo to prevent its shifting or falling as required by Safety and Health Regulations for Longshoring but this contention was not discussed by the Sixth Circuit Court.

The violation of the safety regulations rendered the vessel unseaworthy as a matter of law rendering the shipowner liable for damages for injuries sustained as a proximate result of the breach. *Carey* v. *Lykes Brothers Steamship Company, Inc.* 455 Fed. Rep. 2d 1194.

In *Carey* v. *Lykes Brothers Steamship Company, Inc.*, supra, (5th Cir., Feb., 1972) in *Footnote 2 on page 1194* it stated:

> "The safety regulation was received in evidence without objection at trial, and its violation appears to be undisputed. Such regulations define the appropriate standard of care and failure to observe them renders the vessel unseaworthy irrespective of knowledge or negligence on the part of the shipowner. See recent decisions of this Circuit and other jurisdictions to the effect that the violation of a safety regulation renders the vessel unseaworthy *as a matter of law* rendering the shipowner liable for damages for injuries sustained as a proximate result of the breach. Citing *Manning v. M/V Sea Road*, (5th Cir. 1969) 417 F. 2d 603; *Phipps* v. *S.S. Santa Maria*, (5th Cir. 1971) 418 F. 2d 615; *Simmons* v. *Gulf & South American S.S. Co.*, (5th Cir. 1968) 394 F. 2d 504; *Grigsby* v. *Coastal Marine Service of Texas, Inc.*, (5th Cir. 1969) 412 F. 2d 1011; *Venable* v. *A/S Det. Forenede Dampskibsselskab* (4th Cir., 1968) 399 F. 2d 347."

The case of *Venable* v. *A/S Det. Forenede Dampskibsselskab* 399 F. 2d 347 held among other things that a violation

of longshoring safety regulations renders ship unseaworthy and if such unseaworthiness is the proximate cause of longshoreman's injury, it also renders shipowner liable.

In *Manning* v. *M/V Sea Road*, 417 F. 2d 603, a Government Safety Regulation for Longshoring was breached in that a manhole was left open in a part of the ship where longshoremen were working. The Court held that the violation of the Governmental Safety Regulations for Longshoring made the vessel unseaworthy and permitted recovery for injuries to a longshoreman who stepped into the manhole.

The Court in the *Manning* case cited *Provenza* v. *American Export Lines, Inc.* (4th Cir., 1963) 324 F. 2d 660 and said as follows:

> "Nevertheless if the violation of the regulations by the stevedore created a dangerous condition then the law is clear that the shipowner is in turn also liable, even if he did not know of the dangerous situation created by the stevedore, for that is the nature of the owner's duty of seaworthiness. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406."
>
> • • • • •
>
> "Furthermore, we are also forced to the conclusion that in the area covered by the regulations their violation would render the ship unseaworthy, and if such unseaworthiness was the proximate cause of the plaintiff's injury, it would also render the defendant shipowner liable. • • • "
>
> "Prior to the enactment of 33 U.S.C.A. Sec. 941 and promulgations of the regulations thereunder, what constituted negligence or unseaworthiness was to be determined by the jury under the definition laid down by the courts. Now, with respect to longshoring, the statute law of the United States has laid down definite standards • • • 324 F. 2d at 665".

QUESTION 3

THE DECISION IN THE INSTANT CASE BY THE SIXTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH DECISION OF COURTS IN OTHER CIRCUITS.

Petitioner contends that the decision of the Sixth Circuit Court of Appeals in the instant case is contrary to and in conflict with the decision and opinion of the Courts of Appeal in other circuits and that these conflicting decisions make it imperative for the United States Supreme Court to clarify the rule laid down in the *Usner* case.

Decisions in other Circuit Courts of Appeal have held based on similar sets of fact that a condition of unseaworthiness existed.

In the case of *Siderewicz* v. *Enso-Gutzeit O/Y Finn Lines, Ltd.* 453 Fed. 2d 1094 (Second Circuit, Jan. 4, 1972) a longshoreman sued a shipowner for injuries through the alleged unseaworthiness of a vessel which he was helping to unload. He was hurt when one of the hooks after being freed of bales in the unloading process, snagged on part of the pier as the empty sling to which it was attached was being returned to the vessel. He contended the hook caught in the pier because of improper method of unloading. The District Court dismissed the case before submission to the jury and longshoreman appealed.

The Court held on *page 1095* that the *Usner* case reiterated that a ship's unseaworthy condition could arise from an improper method of loading her cargo and an improper method of unloading falls into the same class citing *Gutierrez* v. *Waterman S. S. Co.* 373 U.S. 206; *Atlan-*

tic & Gulf Stevedores, Inc. v. *Ellerman Lines, Ltd* supra.

The general procedure was to discharge eight bales at a time, each with two hooks, but there was testimony that the particular draft unloaded to the pier just before the accident contained an extra ninth bale tied by rope, without hooks, to the other eight. This made the process unsafe and unseaworthy because to discharge such an overload sling required it to be brought closer to the floor of the pier with the likely result that the hooks would drag on or near the floor after unloading and tend to get snagged.

In addition, plaintiff relied on a portion of the Safety & Health Regulations for Longshoring [29 CFR Sec. 1504, 81(e).]

The Court held that "on this evidence the jury could decide that the improper condition of unloading proximately caused the accident" and reversed the decision of the lower court saying "on both of these issues, unseaworthiness and proximate causation, the jury could reasonably find either way, and a direction for defendants could not properly be made."

The *Sidorowicz* case, supra, closely follows the facts in the instant case. In that case there was an act of negligence by a fellow longshoreman resulting from an improper method of unloading. There was also a breach of Safety and Health Regulations as in the instant case. The Second Circuit Court in that case interpreted and applied the *Usner* case differently from the Sixth Circuit Court in the instant case and arrived at a different conclusion. Clearly this conflict between Circuit Courts of

Appeal calls for a clarification of the law and of the application of the rule in the *Usner* case.

In the case of *Ryan* v. *Pacific Coast Shipping Co., Liberia,* 448 F. 2d 525 (9th Circuit, Sept. 8, 1971) there was an action by a longshoreman to recover for personal injuries resulting from alleged unseaworthiness of the vessel.

Crane operator lifted load of steel pipe which he was to put into a gondola car. This load was crooked and the crane operator attempted to straighten out this load by carrying the boom of the crane over and past the gondola car while lowering the load into the car, so that one end of the load would strike the inner side of the gondola car farthest from the ship and thereby cause the load to turn and straighten, with the result that the gondola car tipped over against the car on the adjoining track injuring the longshoreman who was working between the cars. *This was the crane operator's first hoist. (Italics ours)*

It was a single negligent act of the crane operator who used an unsafe, improper method of unloading cargo. This is similar to the instant case in which the hilo operator used an improper, unsafe method of unloading cargo.

The shipowner in the *Ryan* case relied on the *Usner* case while Ryan asserted that the case constituted an unsafe method of unloading the ship's cargo. The District Court held the negligence of the crane operator in using an unsafe method of unloading cargo rendered the vessel unseaworthy. The Court of Appeals upheld the District Court and said on *page 527:*

> "The unsafe manner of unloading cargo utilized by crane operator, Vic Bono, rendered the vessel POPEYE unseaworthy."
>
> "Bono was a "qualified crane operator" and while it is true that the accident occured on his *first hoist*

> (italics ours) — he had relieved Roberts as operator immediately prior to the accident — several eyewitnesses to the accident gave testimony to the effect that Bono appeared to have deliberately directed the slingload of pipe against the side of the gondola car and this evidence, together with other testimony that to do so would constitute a feasible — albeit an unsafe — way to align pipe to permit its loading, in our estimation, provides support for the trial court's determination of the critical issue of fact."

The facts in the *Ryan* case reveal that there were no repeated acts of negligence in that case but only one, on the first hoist, and yet the Court held that this negligence in improperly unloading cargo rendered the vessel unseaworthy.

Again, we have an interpretation of the *Usner* case different from that of the Sixth Circuit Court of Appeals in the instant case, and again, we must point out that because of diversity of interpretation by the Circuit Courts that a clarification must be made by the United States Supreme Court.

RELIEF REQUESTED

Petitioner respectfully prays that this Honorable Court grant its Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

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DATED: OCTOBER 3, 1972.

APPENDIX A

IN THE DISRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

FANNIE SMITH, Admx.,
Plaintiff,

vs. No. 32042

OLSEN & UGELSTAD,
Defendants,

OPINION
(Filed February 24, 1971)

Civil Action #32042 is a civil action brought by Fannie Smith, Administratrix of the Estate of Joseph Smith, against Olsen & Ugelstad, owners of a ship, the M/V MAKEFJELL. Mr. Smith was crushed by a falling crate in the hold of that vessel during its unloading by the Detroit Harbor Terminals, Inc., decedent's employer, on October 14, 1968.

Civil Action #32126 is a suit by the shipowner, Olsen & Ugelstad, to recover indemnity for any sum adjudged due the Administratrix in Civil Action #32042 and for the expenses of defense.

The cases were consolidated for trial and were tried before the Court on September 24, 25, and 29th, 1970. The parties were ordered to file proposed findings of fact and conclusions of law. Proposed findings and conclusions were filed by Olsen & Ugelstad, defendant in Civil Action #32042 and plaintiff in Civil Action #32126 on October 2, 1970. No other proposed findings and conclusions or ob-

jections to those already filed have been received, despite informal extensions of time.

FINDINGS OF FACT

Plaintiff Fannie Smith is a Michigan citizen who is the Administratrix of the Estate of Joseph Smith, Deceased, now pending in Wayne County Probate Court, Wayne County, Michigan.

Defendant in #32042 and Plaintiff in #32126, Olsen & Ugelstad, is a Norwegian business entity which was at all pertinent times the owner and operator of the M/V MAKEFJELL, a general cargo vessel of Norwegian registry, containing five holds, engaged in commerce and navigation upon the high seas and the Great Lakes.

Defendant Detroit Harbor Terminals, Inc., is a Michigan corporation with its office and principal place of business in Detroit and was at all pertinent times engaged in stevedoring at its dock and warehouse facility on the Detroit River.

Jurisdiction is founded upon the commission of a maritime tort upon navigable waters of the United States.

The accident occurred when the decedent, Mr. Smith, as a member of a longshoreman gang employed by Detroit Harbor Terminals, Inc., was crushed to death by a falling crate containing glass.

The glass had been stowed by stevedores in Hamburg and had survived the ocean crossing and seaway voyage without shifting. Each crate weighed in excess of one ton and was constructed of new, rough hewn wood and each crate had three 4" skids permanently affixed to facilitate loading, stowage and discharge by the use of hilos or fork lift trucks.

The crates were stowed in the forward end of the hold, both port and starboard, four tiers high except near the scuttle hatches where only three high stowage permitted entrance to the hold for checking the cargo during the voyage.

Immediately prior to the accident, most of the crates of glass had been removed from the hold and there remained only a single line of crates stowed flush against the forward bulkhead and extending from the center of the vessel to the starboard shipside. The remaining crates varied somewhat in size. Two of the crates, including the fatal crate, were 2′5″ wide, 3′5″ long and 3′6″ high, slightly smaller than the others. Immediately against the side of the ship, crates of similar dimensions were stowed four tiers high. These presented a smooth and even stow. However, inward from the shipside and in the fourth or highest tier were stowed the two smaller crates on top of a column of the wider crates with the result that the two smaller crates overlapped the wider crate and were unsupported at their outer edges. No dunnage was employed since while all the crates were in stow they were quite secure. It was only after some of the lower crates had been removed that the fatal crate became insecure.

One of the wider crates was set immediately to port of the fatal lift in the fourth tier. This crate was lifted down by the hilo operator and set in the starboard forward corner of the hold, out of the way, while the operator returned and picked up two of the wider crates which were partly supporting the fatal lift. The stow of the fatal crate was such that its entire skid on the side nearest the center of the ship was unsupported when the two crates were removed. Probably the fatal crate was jostled when

the operator lifted the two crates out of stow. However, the fatal crate did not fall at this time. The operator took the two crates to the center of the hold and set them down, all of the longshoremen except the deceased following along with the fork lift truck.

The deceased remained in the area where the two crates had been removed and picked up an empty cigar box lying loose in the hold and then proceeded to the point where the two crates had been removed and placed his hand on the last remaining crate of the column which had partly supported the fatal crate and attempted to look behind the remainder of the crates, apparently in hopes of finding some cigars or other article left in the hold from a previous voyage. At that time the fatal crate descended and crushed his read against the remaining crate upon which he had placed his hand to steady himself as he leaned over.

The Court estimates that the fatal crate was precariously balanced some thirty seconds, the time necessary for the hilo to back away from the stow with its load of two crates and set them down in the center of the hold.

The fatal crate was largely supported in the original stow by a column of crates which were not touched by the hilo prior to the accident. The fatal crate overhung the two crates which were removed to the center of the hold by only about 5″, which is to say only a little more than the width of its skid nearest the center of the ship. We do not know how much the fatal crate was jarred out of position by the removal of the two crates partly supporting it, but even if it were not jarred out of position at all, still it would have then been supported by only two of its skids with one skid completely unsupported and hence would have been in a precarious position.

The fatal crate weighed about one ton. It is not clear why it did not fall immediately after the removal of the two crates if it were going to fall at all but perhaps the movement of the hilo about the deck or the setting down of the two crates caused slight vibration sufficient to loosen it from its precarious position. The deceased did not touch the fatal crate or attempt to move any of the others except to rest his hand on one of the crates on the deck. It seems unlikely that his movements could have caused the fatal crate to fall.

Our necessary conclusion is that if the crates had been removed from the stow in proper order, top crate first, as the commonest prudence required, this tragic accident would never, could never, have occurred.

Safety and Health Regulations for Longshoring required:

> (a) When necessary, cargo shall be secured or blocked to prevent its shifting or falling.
>
> (b) In breaking down, precautions shall be taken, when necessary, to prevent the remaining cargo from falling. 29 CFR § 1504.83.

The record is barren of any testimony as to efforts of the longshoremen to prevent the crate from falling.

No ship's equipment or crew were involved in the discharge although one seaman, Francis Joseph, was in the hold watching for pilferage or breakage.

The decedent, Joseph Smith, was born in Detroit on November 18, 1933; had a high school education; was married to Fannie Smith on September 20, 1959 and had been employed by Detroit Harbor Terminals, Inc. as a longshoreman in the shipping season since May, 1967.

During 1968, up to the time of his death, Joseph Smith earned approximately $3,700.00 as a longshoreman. However, at the time of his death he was separated from Fannie Smith and was living with another family to whom he gave all his earnings and was not contributing to the support of Fannie Smith nor had he contributed to her support for several years preceding his death. No children were born of that marriage.

Death was instantaneous.

The shipowner has proved about $1,000.00 expended for the testimony of the witness Joseph who attended the trial from Oslo, but the Court reserves its ruling regarding expenses pending proof of attorney fees and other costs or stipulation of counsel.

CONCLUSION

The Court has jurisdiction of the subject matter and the parties in both suits. *Gutierrez* v. *Waterman S.S. Corp.*, 373 U. S. 206 (1963).

No shipowner negligence appears, and the Court finds that the vessel and her cargo were seaworthy in all respects.

The cause of the accident was the negligence of the longshoremen in taking down the crates in improper order coupled with the contributory fault of the deceased in being in a place of danger bent on personal gain and without attention for his own safety. The contributory negligence of the deceased is set at 35%.

The death case (Civil Action 32042) is governed by references to, but not by, the Death on the High Seas Act. *Moragne* v. *States Marine Lines*, 398 U. S. 375 (1970).

The indemnity case (Civil Action 32126) is governed by *Ryan Stevedoring* v. *Pan-Atlantic Steamship*, 350 U. S.

124 (1956), and its progeny.

The Longshoring Regulations have the force and effect of law and were plainly breached. *Manning* v. *M/V "Sea Road,"* 417 F 2d 603 (5th Cir. 1969).

The shipowner is not liable in Civil Action #32042 because of the total absence of negligence of unseaworthiness It is now clear that instant unseaworthiness resulting from the operational negligence of the stevedoring contractor or his servants is not a basis for recovery by an injured longshoreman. *Usner* v. *Luckenbach Overseas Corporation et al.*, ... U. S. ..... (39 LW 4146, Jan. 25, 1971).

No damages are proved in the first case (#32042) because the death was instantaneous and no loss of consortium exists in law, *Igneri* v. *Cie. de Transporta Oceaniques*, 323 F 2d 257 (2d Cir. 1963) or on the facts; and plaintiff has lost no reasonably expected contribution, *Petition of Risdol & Anderson, Inc.*, 291 F. Supp. 353 (DC Mass 1968).

The negligence of the deceased, as well as that of the other longshoremen, is a breach of the warranty of workmanlike service owed by the stevedore, Detroit Harbor Terminals, Inc., to the shipowner, Olsen & Ugelsted. *Hartnett* v. *Reiss Steamship Co.*, 421 F 2d 1011 (2d Cir. 1970).

The shipowner is entitled to the reasonable expense incurred in defending the first suit. *Strachan Shipping Co.* v. *Koninklyke Nederlandsche S. M., N. V.*, 324 F 2d 746 (5th Cir. 1963).

Appropriate orders shall be submitted in ten days.

It is so ordered.

/s/ Talbot Smith
United States District Judge

Detroit, Michigan
February 24, 1971

APPENDIX B
(Title of Court and Cause)

ORDER

At a session of said Court held in the Federal Building, City of Detroit, State of Michigan, this 30th day of March, 1971.

PRESENT: HONORABLE TALBOT SMITH, U.S. District Judge.

This cause having come on for hearing in open court before the Honorable Talbot Smith and the Court having heard and considered the evidence and arguments of counsel and the Court having therefore entered its Opinion with Findings of Fact and Conclusion of Law,

NOW THEREFORE, it is hereby ordered, adjudged and decreed that judgment of no cause for action be entered in favor of the defendant and against the plaintiff with costs to be taxed in favor of the defendant within 30 days unless sooner stipulated by the parties.

TABLOT SMITH
U.S. District Judge

A True Copy
FREDERICK W. JOHNSON, Clerk
By MARY ANN GOLDBURG
Deputy Clerk
Approved as to Form Only
POSNER & POSNER
By: .....
Attorney for Plaintiff
712 Penobscot Building
Detroit, Michigan 48226

APPENDIX C

No. 71-1574

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FANNIE SMITH,
Plaintiff-Appellant,
v.
OLSEN & UGELSTAD,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan, Southern Division.

Decided and Filed May 8, 1972.

Before: The HONORABLE TOM C. CLARK*, Associate Justice, and McCREE and MILLER, Circuit Judges.

MILLER, Circuit Judge. During an unloading operation on the ship M/V Makefjell on October 14, 1968, longshoreman Joseph Smith was crushed to death by a falling crate containing glass. His legal wife, and the administratrix of his estate, Fannie Smith, brought this action asserting the maritime claim for unseaworthiness against the shipowner, Olsen & Ugelstad.[1] In the same proceeding, the shipowner

*The Honorable Tom C. Clark, formerly Associate Justice of the Supreme Court of the United States, sitting by designation.

[1] The action was instituted pursuant to Rule 9(h), Federal Rules of Civil Procedure. Rule 9 provides in pertinent part:

(h) **Admiralty and maritime claims.** A pleading or count, setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. The reference in Title 28, U.S.C. § 1292(a) (3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h).

The claim for unseaworthiness exists independently of the wife's recovery under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq.

sought indemnity from Detroit Harbor Terminals, Inc., the stevedoring company which employed the deceased longshoreman.

The action was tried to the district court in admiralty. The court found as facts that the vessel's cargo of crates was securely and properly stowed, and that the accident occurred because supporting crates were negligently removed from under the crate that fell. The court concluded that the ship was seaworthy in all respects; that the death was caused by the negligent act of a fellow longshoreman; and that the stevedoring company failed to provide workmanlike service and therefore was required to indemnify the shipowner for reasonable expenses incurred in defending the action.[2] The administratrix appeals.

The M/V Makefjell was loaded with cargo in Hamburg, Germany by German stevedores. The cargo in hold #4, where the accident occurred, consisted of wooden crates each holding approximately one ton of glass. The crates were stacked four tiers high throughout the stow except near the hatches where three tier stacks permitted entry into the hold to check the cargo during the voyage. Each crate had three four inch skids[3] attached to its base to facilitate handling and stowage Aside from stabilizing the stow,

---

[2] Although we need not review the allegations of error as to other findings and conclusions of the court below, we briefly mention those findings. First, the court found the deceased guilty of contributory negligence to the extent of 35% because he failed to watch for his own safety while pursuing his personal interests rather than attending to his job. Second, the court found that Joseph Smith had abandoned his legal wife and was living with and supporting another family. The deceased had not contributed to his legal wife's support for several years and the court concluded that she was deprived of no reasonably expected contribution to her support.

[3] A skid is a wooden two-by-four runner attached to the bottom of the crate.

skids served to separate the stacked crates so that the blades of a fork-lift truck (hilo) could easily be inserted under the crate.

The Makefjell left Hamburg and proceeded to Montreal and then to the Detroit Harbor. The stow survived the North Atlantic crossing without shifting. When the ship arrived at Detroit, the stevedoring company sent its longshoremen and its equipment to unload the cargo. Prior to the accident, most of the crates had been removed from the hold. Remaining was a single line of crates four tiers high in separate stacks against the forward bulkhead. On the fourth level of one stack were two smaller crates. These companion crates (sitting side-by-side) covered a wider space laterally than those beneath them in the column. As a result, the outside skid on each of the companion crates extended beyond the sides of the stack below. To the right of this column were other stacks. To the immediate left of the column was a stack which a hilo operator was attempting to remove when one of the companion crates fell. The top crate of the latter stack had been removed without incident. The operator then removed two crates which were lower than the fatal crate and which partly supported it. This crate remained precariously balanced for approximately thirty seconds and then fell, striking Smith and instantly killing him. The normal procedure is to remove the higher crate first.

When the crate fell, Joseph Smith was supposed to have been following the hilo truck and fixing slings around the crates so that they could be lifted out of the hold. Instead, he remained behind carrying an empty cigar box and peering behind the stacked crates apparently in search of something.

On appeal, the administratrix challenges both the factual findings and the legal conclusions of the district court. She argues that the episode in hold #4 demonstrates that the vessel was unseaworthy. In asserting her claims, we first consider the assertions that the equipment used by the longshoremen was inadequate and that the cargo was improperly stowed. The contrary findings by the court below may be disapproved only if they are clearly erroneous. Rule 52(a), Federal Rules of Civil Procedure; *Utzinger* v. *United States*, 432 F.2d 485 (6th Cir. 1970).

The applicable principles of maritime law are settled. The concept of seaworthiness imposes upon the shipowner the duty to furnish a vessel and appurtenances reasonably fit for their intended use. *Mitchell* v. *Trawler Racer*, 362 U.S. 539 (1960). That duty extends to a longshoreman engaged in unloading the ship. *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946). Part of the obligation is to provide reasonably safe equipment, and the duty is nondelegable. *Id.* Thus even though the equipment belongs to the longshoring company and is used only by longshoremen, the shipowner remains liable for injury caused by the unsafe equipment. *Alaska Steamship Company* v. *Petterson*, 347 U. 396 (1954).

It is argued by appellant that the operator failed to remove the top crate first because the hilo was incapable of accomplishing this. Four longshoremen offered their conclusions that the hilo would not reach the fourth level of crates. Three said that the shaft to which the fork-lift blades were attached was too short to raise the blades the necessary height. One stated that the shaft was too long and would hit the ceiling before the blades reached the necessary height. Opposed to this testimony was the fact that most of the crates of glass had already been removed

without incident prior to the accident. The ship's watchman testified that the hilo operator removed without difficulty a crate which was stacked on the two supporting crates and which was to the immediate left of the one that struck Smith when it fell. In addition, the watchman testified that he later saw the same hilo remove the companion crate. In view of this conflicting evidence, we cannot say that the district court was clearly erroneous in finding the hilo adequate for its intended purpose.

Appellant also challenges the finding that the cargo was securely stowed. She argues that different size crates should not have been stowed in the same stack and contends that dunnage should have been placed between the crates in each stack to prevent their sliding.[4] The longshoremen testified that dunnage was needed to secure the cargo. It is settled that cargo stowed unsafely may render a vessel unseaworthy. *Guitierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963). There can be no doubt that uneven stacks or stacks without dunnage could possibly be unsafe. But the cargo here survived an ocean voyage without shifting and apparently was stable until the supporting crates were removed. The ship's watchman testified that no dunnage was necessary in this stow because all crates had skids and because the stow was secure. While the record leaves some doubt whether the stowage was perfectly secure, the evidence to the contrary is not so convincing as to compel us to conclude that the district court's finding on this point was clearly erroneous.

Appellant's final attempt at establishing unseaworthiness focuses upon the nature of the incident in hold #4 and upon

[4] Dunnage consists of pieces of board which may be placed between the various layers of crates and which runs the length across the crates. Its purpose is primarily to keep the stow level and secure.

the legal consequences deriving therefrom. She contends that improper unloading of the cargo created a dangerous condition which rendered the vessel unseaworthy. Appellant suggests in her brief that the removal of the supporting crates left the one that fell in a dangerous and unsupported condition." Olsen & Ugelstad argues that the result of this "condition" was that the crate quickly fell. Appellee contends that the death of Joseph Smith resulted from the negligent act of the hilo operator and not from any condition of unseaworthiness.

Appellant correctly observes that an unsafe procedure prescribed for unloading cargo may result in a condition of unseaworthiness. *See A. & G. Stevedores* v. *Ellerman Lines*, 369 U.S. 355 (1962). And unseaworthiness may occur when the unsafe condition is only temporary or transitory. *Mitchell* v. *Trawler Racer, supra.* It is now clear, however, that an isolated personal act of negligence does not constitute unseaworthiness. *Usner* v. *Luckenbach Overseas Corp.*, 400 U.S. 494 (1971). In finding that a single and unforeseeable act of negligence created no condition of unseaworthiness, the Supreme Court recently stated:

> A vessel's condition of unseaworthiness might arise from any number of circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. The number of men assigned to perform a shipboard task might be insufficient. The method of loading her cargo, or the manner of its stowage, might be improper. For any of these reasons, or others, a vessel might not be reasonably fit for her intended service.
>
> What caused the petitioner's injuries in the present case, however, was not the condition of the ship, her appurtenances, her cargo, or her crew, but the iso-

> lated, personal negligent act of the petitioner's fellow longshoreman. To hold that this individual act of negligence rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions. Id., at 499-500.

Thus it is necessary to determine whether the death of Smith resulted from an act of negligence or a condition of unseaworthiness. Very likely a resolution of this problem will often involve metaphysics as well as judgment. A negligent act conceivably could produce a hazardous condition or it might be completed without causing this result. The determination of the distinction will oftentimes be elusive and will depend upon the particular facts of the given case. Here, as the District Court found, the ship's cargo was stowed securely and the hilo operator was aware of the fact that the higher crates should be removed first. There was evidence that he did not do this because he would have been required to climb down from the truck and adjust the fork-lift blades in order to remove the crates of smaller dimensions which were on the top level. From this evidence it was reasonable for the court below to find that the hilo operator acted negligently and that no condition of unseaworthiness was created or called into play.

The District Court's determination that the longshoreman's death resulted from an isolated, unforeseeable act of negligence and not from a condition of unseaworthiness is further supported by the fact that the fatal injury occurred within thirty seconds after the falling of the crate.

Accordingly, the judgment of the District Court is affirmed

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-276

FANNIE SMITH,
Petitioner

v.

OLSEN & UGELSTAD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioned,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 5, 1972.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 8th day of September, 1972.

APPENDIX E

JURISDICTIONAL PROVISIONS AND STATUTES

28 U.S.C., Sec. 1254 (1):

"Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:

(1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment of decree. ***"

72-543

No. .....

Supreme Court
FILED
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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

October Term, 1972

FANNIE SMITH, ADMINISTRATRIX
OF THE ESTATE OF
JOSEPH SMITH, DECEASED, Petitioner,

vs.

OLSEN & UGELSTAD, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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THE DETROIT LEGAL NEWS, DETROIT, MICHIGAN

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No. .....

IN THE

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October Term, 1972

FANNIE SMITH, ADMINISTRATRIX
OF THE ESTATE OF
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vs.

OLSEN & UGELSTAD, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Olsen & Ugelstad, respondent, prays that the Petition for Writ of Certiorari sought in this case be denied.

QUESTIONS PRESENTED
STATEMENT OF THE CASE

For the purpose of this Petition for Writ of Certiorari only, where, as respondent understands it, the question before the Court is whether the petition should be granted or denied, respondent accepts the Questions Presented and the Statement of the Case of petitioner. Still it appears the petition should be denied.

ARGUMENT

A.

There is now before the President for signature or pocket veto a bill (S 2318) which had the support of both labor and management in the House and Senate which abolishes the doctrine of unseaworthiness in longshoremen's cases in return for doubling the benefits under the Longshoremen and Harbor Workers' Compensation Act. Whether this bill is signed (as radio reports say) or not it plainly appears that the matter of the warranty of seaworthiness for longshoremen cases is in the mind of the Congress for sharp change in the present bill or other change in some future bill more acceptable to the President.

The sole purpose of this petition is "*** for this Court to now clarify its interpretation of unseaworthiness". (page 5 of the Petition) Under the circumstances, this would be an exercise in futility.

Certainly it can no longer be said that the questions presented here are of any great interest to the profession generally or that if there be any conflict within the Circuits, which is denied, such conflict needs resolution by this Court at this time.

B.

Many times even where the issues presented are not of interest to the profession generally, they are of interest to the parties. However, in this case the District Court found that no damages were proved because death was instantaneous and no loss of consortium existed in law or fact and petitioner lost no reasonably expected contribution. While the Court of Appeals did not review these findings (see footnote 2 of its Opinion) they are plainly the truth and

apt to be re-found on any re-trial. Hence the issues here are not even of interest to the parties themselves.

Indeed, it appears that this particular widow is better off drawing her benefits under the Longshoremen and Harbor Workers' Compensation Act until death or remarriage than in processing this petition.

RELIEF REQUESTED

Accordingly, respondent respectfully prays this petition be denied.

Respectfully submitted,

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Attorneys for Respondent

DATED: OCTOBER 31, 1972